

No. 10639

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALEXANDER CHASKIN, Doing Business as CHASKIN
CITRUS Co.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

APPELLANT'S OPENING BRIEF.

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Proceedings in the Court Below.

This action was filed by the plaintiff and appellant in the Superior Court of the State of California in and for the County of Los Angeles, against the defendant and appellee, to recover damages for interference with the appellant's business.

In his complaint the appellant alleged that he is a resident of Los Angeles County, engaged in the business of buying and selling, at wholesale, citrus fruits grown in the State of California; that in the course of such business he made and entered into contracts, agreements, and continuing business relations with packers of citrus fruit in California to supply and sell oranges to him, and with brokers in California to procure oranges for him, in order that he might resell the same to his customers at a profit,

and that on or about August 2, 1943, he had such contracts, agreements, and business relations with numerous packers and brokers of citrus fruit in California to sell to and procure for him packed boxes of oranges, and also had numerous orders from customers to purchase such oranges from him at prices which would have netted him a very substantial profit; that on or about said date, and every day thereafter, the appellee, also a resident of Los Angeles County, knowing of the existence of said contracts, agreements, and business relations, wrongfully, unlawfully, and intentionally solicited said packers and brokers to breach their said contracts and agreements with the appellant, and to terminate their said business relations with him, and wrongfully, unlawfully, and intentionally interfered with the appellant's said business, and with the appellant's rights under his said contracts, agreement and business relations [pp. 2-4*].

The complaint further alleged that the appellee called upon and communicated with said packers and brokers and sought to induce and coerce them to breach their then existing contractual and business relations with the appellant, by falsely, fraudulently and maliciously stating and representing to such packers and brokers that as an employee of the United States Department of Agriculture he had the lawful power and authority to cause them, and each of them, to suffer great loss, injury and damage by causing priorities for farming and packing equipment, machinery, and supplies to be withheld from and denied to them, and by causing their gasoline rations to be curtailed and restricted, and by causing suits and proceed-

*Page references throughout brief are to printed Transcript of Record.

ings to be brought against them for various penalties and forfeitures, whenever he chose so to do, and by stating, representing and threatening that he would exercise such pretended power and authority against them unless they breached their said contracts and agreements with the appellant and terminated their said business relations with him, and refrained from selling to the appellant or procuring for him any oranges whatever; that all of the foregoing was done by the appellee for the purpose and with the intention of preventing the appellant from obtaining supplies of oranges to fill his customers' orders, and of injuring and damaging the appellant and bringing about the failure and destruction of his business; that the appellee was successful in such efforts, and as the direct and proximate result thereof said packers and brokers cancelled and breached their contracts and agreements with the appellant, and refused to comply with or fulfill the same, and terminated and refused to enter into or continue business relations with the appellant, or to furnish to or procure for him further supplies of oranges; that the appellant was thereby prevented from purchasing or procuring approximately three hundred carloads of oranges which said packers and brokers had undertaken and agreed to sell to or procure for him, and which they would have sold to or procured for him, but for the said wrongful and unlawful interference on the part of the appellee; and that by reason thereof the appellant was unable to fill his customers' orders for said oranges, and lost said business and the profits which he would have derived and realized therefrom, and the good will attaching to his business was thereby injured and damaged, all to the appellant's damage in the sum of \$50,000.00 [pp. 4-6].

It was further alleged in said complaint that the appellee made said false and fraudulent statements, representations and threats, well knowing that he had no lawful right so to do, and well knowing that the appellant needed the oranges so contracted for to fill his customers' orders and to conduct and carry on his business; and that the appellee, nevertheless, wrongfully, fraudulently, and maliciously desiring and intending to interfere with and disrupt the appellant's business and destroy the same, and thereby to cause the appellant to suffer great loss, injury and damage, did all of the said acts and things, and pursued the said course of conduct, willfully, fraudulently, oppressively and maliciously, and with reckless disregard for the rights of the appellant; and the appellant, therefore, prayed for judgment against the appellee for \$50,000.00, actual damages, and \$150,000.00, exemplary and punitive damages [pp. 6, 7].

The appellee, by and through the United States Attorney at Los Angeles, then filed in the State Court a Notice of Motion and Petition for Removal, a Bond on Removal, and a Demurrer to the complaint [pp. 8-19].

In the Petition for Removal the appellee alleged that he was and is Field Representative of the Secretary of Agriculture of the United States of America, and Field Representative of the Fruit and Vegetable Branch of the Food Distribution Administration of the War Food Administration [pp. 9, 10]. As grounds for removal, the appellee in said petition alleged that the action is one arising under the laws and the Constitution of the United States of America, in that the appellee is an officer of the United States, and in all of the matters set forth in the complaint he was acting for and on behalf of the

United States, particularly requiring construction and interpretation of the First War Powers Act of 1941, and of the Agricultural Adjustment Act as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, and also of Executive Order No. 9280, issued December 5, 1942 [pp. 10, 11]. The petition concluded with the prayer that the bond filed therewith be accepted, that the State Court make its order for the removal of the cause to the District Court of the United States for the Southern District of California, Central Division, pursuant to Title 28, United States Code, Sections 71 and 72, and cause the record therein to be removed to said District Court, and that no other or further proceedings be had in said cause in the State Court [p. 12].

The demurrer filed on behalf of the appellee alleged merely that the complaint does not state facts sufficient to constitute a cause of action [pp. 17-19].

The appellant then filed in the State Court his Answer and Objections to the Petition for Removal, denying, for lack of information and belief, the authority of the United States Attorney to appear for the appellee, and the appellee's alleged official capacity, and denying specifically that the action is one arising under the laws or the Constitution of the United States, or that the appellee was an officer of the United States acting for or on behalf of the United States in the matters set forth in the complaint, or that construction or interpretation of the statutes or the Executive Order referred to in the Petition for Removal is required. In his Answer the appellant further alleged that the Petition for Removal does not state facts sufficient to constitute grounds for removal, that the action is between two individuals, resi-

dents of the State of California, and is not brought against an officer of the United States, and is not one arising under the Constitution, laws or treaties of the United States, within the meaning of Section 28 of the Judicial Code of the United States, and is not a proper case for removal to the Federal Court, and that the Federal Court is without jurisdiction to entertain the action. The Answer prayed that the Petition for Removal be denied, and that the State Court retain jurisdiction of the cause [pp. 20-22].

Pursuant to the notice filed by the appellee, the Petition for Removal came on for hearing in the State Court, and was denied [pp. 22-23]. The appellee's demurrer likewise came on for hearing, and was overruled, and the appellee was given ten days to answer [p. 23].

The appellee, acting by and through the United States Attorney, then procured from the clerk of the State Court a certified copy of the record in that court, and filed the same in the United States District Court for the Southern District of California, Central Division [p. 24]. The appellee thereupon filed a petition in the Court below, setting forth the filing of his petition and bond for removal and the denial by the State Court of said petition, and the filing of the certified transcript of the record, and alleging that by stipulation of counsel the appellee's time to answer in the State Court had been extended beyond the ten days allowed by that Court, and that it is the purpose and intent of the appellant to prosecute said action in the State Court to final judgment. The petition prayed that an order be made and entered by the Court below staying all proceedings in the State Court until further order of the Court below [pp. 25-26].

Concurrently with the filing of said petition, the Court below issued an Order to Show Cause directed to the appellant, requiring him to appear and show cause why he should not be restrained and enjoined from prosecuting any further proceedings or taking any further steps in the State Court in said action [pp. 28-29].

Upon being served with said petition and order to show cause the appellant, appearing specially, served and filed a Notice of Motion to Remand, noticing the same for hearing at the time of the hearing on the order to show cause in the Court below. As grounds for the motion to remand, the appellant alleged that the Court below has no jurisdiction to hear and determine the cause, that it appears upon the face of the record that the cause is not one arising under the Constitution, laws or treaties of the United States, within the meaning of Section 28 of the Judicial Code of the United States, and is not one within the original jurisdiction of the Court below, and hence that said Court has no jurisdiction of the action or of the parties thereto under the attempted removal [pp. 30, 31].

The appellee's petition for a restraining order and the appellant's motion to remand were argued together in the Court below. No evidence whatever was introduced at the hearing. At the conclusion of the argument, the Court below made a minute order granting the appellee's petition, and denying the appellant's motion to remand [p. 36].

Thereafter, the Court below made and entered a formal order denying the appellant's motion to remand, without making any findings of fact or conclusions of law in connection therewith [p. 37].

Subsequently, findings of fact and conclusions of law were made and filed by the Court below on the appellee's petition for a restraining order. The Court found that the action was brought by the appellant against the appellee for damages and that both are residents of the City and County of Los Angeles, State of California, and set forth the prior proceedings [pp. 38, 39]. The findings then quoted paragraph VI of the appellant's complaint, being that portion of the complaint which specified the particular acts of the appellee of which complaint was made. As conclusions of law, the Court below concluded that it has jurisdiction over all the parties and the subject matter, and that the appellee is entitled to a permanent injunction restraining and enjoining the appellant, his agents and his attorney, from prosecuting any further proceedings or taking any steps in the State Court in said action [pp. 39-41].

The Court below then made and entered a decree of injunction, restraining and enjoining the appellant and his attorney from prosecuting any further proceedings or taking any steps in the State Court in said action, and a writ of injunction issued thereon [p. 42-46].

From the said minute order granting the petition of the appellee for an order staying proceedings in said action in the State Court, and from the said judgment or decree of injunction this appeal is taken [pp. 46, 47].

Statement of the Case.

This appeal presents no new question of law. It is the contention of the appellant that the action of the Court below simply constitutes a departure from well established precedent.

In support of his position the appellant contends, as he did in answering the appellee's petition for removal in the State Court and in moving the Court below to remand the cause, that as appears upon the face of the record, the action is one between two individuals, residents of the State of California, is not brought against an officer of the United States, and is not one arising under the Constitution, laws or treaties of the United States, within the meaning of Section 28 of the Judicial Code of the United States, and is not one within the original jurisdiction of the Federal Court; and, therefore, that the Court below being without jurisdiction over the action or the parties, the cause should have been remanded to the State Court; and, consequently, that the injunction of the Court below is void.

Specification of Errors.

The appellant in this appeal relies upon the following errors of the District Court:

1. The Court erred in holding that it has jurisdiction over the action or over the parties thereto.

2. The Court erred in making and entering the order and the judgment appealed from for the reason that it was without jurisdiction so to do.

3. The Court erred in making and entering the order and the judgment appealed from for the further reason that the evidence is insufficient to support and does not support the findings of fact, or the conclusions of law, or the order or judgment of said Court.

4. The Court erred in making and entering the order and the judgment appealed from for the further reason that the findings of fact do not support the conclusions of law or the order or judgment of said Court.

5. The Court below erred in making and entering the order and the judgment appealed from for the further reason that the conclusions of law do not support the order or judgment of said Court.

6. The Court below erred in denying appellant's motion to remand the cause to the Superior Court of the State of California in and for the County of Los Angeles.

Argument.

For convenience in presenting appellant's argument, Specifications Numbers 1 and 2 will be discussed together, Specifications Numbers 3, 4 and 5 will likewise be grouped, and Specification Number 6 will be discussed separately.

I.

The Court Below Lacks Jurisdiction Over the Action or the Parties Thereto, and Was Without Jurisdiction to Make the Order or the Judgment Appealed From.

It has long been the settled rule that the question whether or not a case is removable as one arising under the Constitution or laws of the United States is to be determined by the allegations of the plaintiff's complaint, and if the case does not thus appear to be removable it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.

28 U. S. C. A., Sec. 71, note 221;

Tennessee v. Union etc. Bank (1894), 152 U. S. 454;

Chappell v. Wentworth, 155 U. S. 102;

Mountain View M. & M. Co. v. McFadden, 180 U. S. 533;

Minnesota v. Northern Securities Co., 194 U. S. 48;

American Well Works Co. v. Layne etc. Co., 241 U. S. 257;

Great Northern R. Co. v. Alexander, 246 U. S. 276;

Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99;

Gully v. First National Bank (1936), 299 U. S. 109.

"The rule has frequently been laid down that to render an action removable to a federal court, under this section, it is necessary that it could have been originally brought in the federal court." (Emphasis supplied.)

28 U. S. C. A., Sec. 71, note 73 (citing many cases).

"The only ground of jurisdiction which is or can be suggested is that the suit was one arising under the Constitution and the laws of the United States. . . . It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. (Citing cases.) If the defendant has any such defense to the plaintiff's claim, it may be set up in the state courts and if properly set up, and denied by the highest court of the state, may ultimately be brought to this court for decision.

"It is well settled that the entry of a federal question into a case by way of defense, although it may present the controlling or the only disputed question, does not justify removal under section 28 of the Judicial Code."

In re Winn, 213 U. S. 458.

“We consider it well settled that a cause of action does not arise under federal laws so as to justify removal, unless the plaintiff’s right, to enforce which the suit is brought, arises out of and depends upon those laws, so that both in stating and in proving his case he must show that his right to recover stands upon the federal law; and that, even though his complaint may disclose that the case will turn upon and be ruled by the construction and effect given to some federal law under which the defendant is claiming, the federal jurisdiction will fail.” (Citing *Tenn. v. Union Bk.*, 152 U. S. 454, 459, 461, and other cases.)

Venner v. New York Central R. Co. (C. C. A. 6),
293 F. 373, 374.

In *Walker v. Collins*, 167 U. S. 57, an action was brought in a state court for damages for an unlawful seizure of plaintiff’s goods and chattels, and the answer of the defendants averred that during the times mentioned in the complaint the defendants were, respectively, a marshal of the United States and his deputies and that the seizure was under authority of an order of attachment issued out of the federal court. It was held that the case was not removable on the ground that it involved a federal question, as such question did not appear from the plaintiff’s pleading.

The rule has also been laid down that the fact that a defendant is an officer of the United States, and claims to have been acting under an Act of Congress in doing the acts complained of, does not authorize removal.

City of Stanfield v. Umatilla River Water Users Assn., 192 F. 596;

People’s U. S. Bank v. Goodwin, 160 F. 727;

4 *Op. Atty. Gen.* 300.

From the foregoing it is quite clear that in determining the removability of the case at bar any and all pleadings filed on behalf of the appellee must be disregarded, and the question determined solely from the allegations of the appellant's complaint. The only allegation upon which the appellee relies to support his position, and, indeed, the only allegation of the complaint which could by any stretch of the imagination be so construed, is paragraph VI, which reads as follows:

“That defendant called upon and communicated with said packers and brokers and sought to induce and coerce them to breach their then existing contractual and business relations with plaintiff, by falsely, fraudulently and maliciously stating and representing to such packers and brokers that as an employee of the United States Department of Agriculture he had the lawful power and authority to cause them, and each of them, to suffer great loss, injury and damage by causing priorities for farming and packing equipment, machinery, and supplies to be withheld from and denied to them, and by causing their gasoline rations to be curtailed and restricted, and by causing suits and proceedings to be brought against them for various penalties and forfeitures, whenever he chose so to do, and by stating representing and threatening that he would exercise such pretended power and authority against them unless they breached their said contracts and agreements with plaintiff, and terminated their said business relations with plaintiff, and refrained from selling to plaintiff or procuring for him any oranges whatever.”

The appellee seeks to construe these allegations to mean that he is being sued as a government official, acting in his official capacity, and, therefore, that the case arises under the laws of the United States. The United States Attorney even goes so far as to assert that "by federal law," the appellee "had the power to do each and every of the things alleged by the plaintiff as being false and fraudulent"! [p. 18].

Obviously, however, there is nothing in the language of paragraph VI of the complaint to indicate the existence of any federal question. Careful analysis of that paragraph shows that it is not even alleged that the appellee is in fact an employee of the government. On the contrary, the wording is susceptible of interpretation that the appellee's representation that he was an employee of the government was as false as his other statements. But even construing the allegation to mean that the appellee was actually an employee of the government, such allegation falls far short of a showing that the case arises under the Constitution or laws of the United States so as to warrant removal, as the authorities cited above plainly demonstrate.

It is apparent, therefore, that when the case is subjected to the tests required by an unbroken line of decisions, the fact that it is not removable is beyond question. It follows that the Court below was and is without jurisdiction to entertain the action, or to make the order or the judgment from which this appeal is taken.

II.

The Evidence, the Findings of Fact, and the Conclusions of Law Are Insufficient, in Any Event.

As has been stated, no evidence whatever was introduced in the Court below in support of the appellee's petition for a restraining order, or otherwise. It will be observed from the Transcript of Record that no evidence in the form of affidavits or other documents accompanied the petition, and that the only evidence before the Court was the certified record of the proceedings in the State Court.

The only evidence, then, to support the action taken by the Court below, if it can be called evidence, is the appellee's petition for removal filed in the State Court, and the only facts alleged in that petition were that the appellee is field representative of the Secretary of Agriculture of the United States of America, and field representative of the Fruit and Vegetable Branch of the Food Distribution Administration of the War Food Administration, an instrumentality and agency of the United States, engaged in the exercise of federal governmental duties and powers [p. 9]. The remainder of the allegations of the petition for removal were all conclusions of law. Among those conclusions of law we find the appellee's statement that in all of the matters set forth in the appellant's complaint he was acting for and on behalf of the United States [p. 10]. All of the material allegations of the petition for removal were controverted and denied by the appellant's answer.

Evidently recognizing the lack of any evidence upon which to base a finding of any specific fact which might

give rise to a federal question, the Court below in its findings of fact merely quoted paragraph VI of the appellant's complaint, and concluded as a matter of law that the Court has jurisdiction over the parties and the subject matter, and that the appellee is entitled to a *permanent* injunction [pp. 38-40], which, incidentally, he had not even requested.

It is submitted that the mere reading of the findings of fact shows conclusively that they do not support the conclusions of law, and that the order and the judgment for a permanent injunction are not supported by either the findings of fact or the conclusions of law.

III.

The Cause Should Now Be Remanded to the State Court.

When a State Court has denied removal and a defendant has filed a petition in the Federal Court to enjoin the plaintiff from proceeding further, a motion by the plaintiff to remand has been held to be the proper procedure.

Bley v. Travelers Insurance Co., 27 F. Supp. 351.

While an order denying a motion to remand may not be directly appealable, nevertheless the appellate court in reversing a judgment for an injunction restraining a party from proceeding further in the State Court will at the same time dispose of the entire controversy by ordering the cause remanded to the State Court. It was so held in *Schell v. Food Machinery Corp.* (C. C. A. 5), 87 F. (2d) 385 (cert. den., 300 U. S. 679).

In the case just cited, an appeal was taken from an interlocutory injunction under Judicial Code, Sec. 129, as amended. (28 U. S. C. A., Sec. 227.) The Court said:

“This cause was removed to the District Court from a state court on the ground that a separable controversy appeared between citizens of different states; a motion to remand was denied and several weeks later, the state court having vacated as improvident the order of removal granted by it, the District Judge enjoined Manatee River Bank & Trust Co., the original complainant, and Frank R. Schell and Rodney B. Harvey, who before removal had filed a joint answer and cross-bill, from acting further in the state court. The three named parties appeal from this interlocutory injunction under Judicial Code, Sec. 129, as amended. (28 U. S. C. A., Sec. 227.)

“We find it necessary to examine only the question of the jurisdiction of the District Court. If it has not jurisdiction of the cause it of course should not have granted the injunction. A federal court may sometimes enjoin proceedings in a state court to protect its own jurisdiction lawfully acquired, but may not interfere even temporarily when it has none. The state court’s order of removal is not conclusive, but if wrongly entered could be, as it was, rescinded. (Citation.) The refusal of the District Court to remand is also not conclusive. The jurisdiction of the District Court comes only from the law and not from its own assertion of a judgment on it, nor from any action of the state court. The refusal to remand, if erroneous is reviewable by this court, ordinarily after final judgment, but also in connection with a reviewable interlocutory order. If the District Court has not jurisdiction, its activities ought at once to cease. In reviewing an interlocutory order under Judicial Code Sec. 129 a bill may be ordered dismissed if

without equity. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 S. Ct. 407, 41 L. Ed. 810; *Meccano v. Wanamaker*, 253 U. S. 136, 40 S. Ct. 463, 64 L. Ed. 822. With much more reason when federal jurisdiction is lacking ought the appellate court so to declare. Judicial Code, Sec. 37 (28 U. S. C. A., Sec. 80) expressly says, if at any time it appears that a removed suit 'does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court . . . the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require.' The question of federal jurisdiction is ever present and self-asserting. The court must of its own motion and even against the consent or the protest of parties consider it. *Mansfield etc. R. Co. v. Swan*, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462; *Morris v. Gilmer*, 129 U. S. 315, 9 S. Ct. 289, 32 L. Ed. 690; *International etc. R. Co. v. Hoyle (C. C. A.)*, 149 F. 180."

* * * * *

"Aside from attacks that have been made on the removal because of a want of the statutory notice to the Trust Company and because of the failure in the petition to point out the separable controversy claimed to exist, we think no available ground of removal can be found, that the District Court acquired no jurisdiction, and that its injunction order is erroneous. The judgment is accordingly reversed, with direction to remand the cause to the state court."

It is submitted that the *Schell* case, in which certiorari was denied by the Supreme Court of the United States, is squarely in point, and is sufficient authority to justify this Court in ordering the present case remanded to the State Court.

Conclusion.

In accord with the foregoing, the appellant prays that the order and judgment appealed from be reversed, with direction to remand the cause to the Superior Court of the State of California in and for the County of Los Angeles.

Respectfully submitted,

G. V. WEIKERT,

Attorney for Appellant.